

Note

Death or Disability of Judges in Civil Litigation—Substitution Under Federal Rule 63

I. INTRODUCTION

Federal Rule of Civil Procedure 63, which deals with the procedural consequences of the death or disability of judges, has remained unchanged since its promulgation in 1937.¹ The Rule allows discretionary substitution of judges on the occasion of the death or disability² of a presiding judge "after a verdict is returned or findings of fact and conclusions of law are filed." It is apparently inapplicable, however, with respect to the propriety of substitutions in trials prior to such a time,³ and the history of the Rule is ambiguous on this question.⁴

Notwithstanding the seeming facial clarity of Rule 63, the question whether the Rule allows midtrial substitution of a judge over the objections of one of the parties was raised in the context of a civil jury trial in *Whalen v. Ford Motor Credit Co.*⁵ In *Whalen* plaintiffs, owners of a condominium project, alleged that defendant Ford Motor Credit had wrongfully refused payment of a loan obligation and sued in the Federal District Court for the District of Maryland.⁶ The case was assigned to Judge

1. The Rule reads:

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Federal Rule of Civil Procedure 63 is hereinafter referred to variously as Federal Rule 63 or simply Rule 63.

2. The term "disability" is not limited to instances of physical or mental illness. Although there appear to be few cases on point, the Rule and its predecessor, former 28 U.S.C. § 776 (repealed 1948), have been applied to any "incapacity to do a legal act." See 7 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 63.03, and cases cited at 63-3 nn.1 & 3 (1972 & Supp. 1982-1983) [hereinafter cited as *MOORE'S*]. This includes resignation and, presumably, disqualification. *Id.* Some state statutes that mirror Federal Rule 63 specifically include resignation and removal as covered disabilities. See *infra* note 131. In some states, if the death or disability of the judge is the result of a nuclear war or other "attack upon the United States of unprecedented size and destructiveness," special provision has been made for judicial substitution. See, e.g., DEL. CODE ANN. tit. 10, §§ 1801-1807 (Emergency Interim Judicial Succession Act) (1974).

3. See *Whalen v. Ford Motor Credit Co.*, 32 Fed. R. Serv. 2d 678, 679 (4th Cir. 1981) ("[Rule 63] does not expressly address the question of substitution in a jury trial before the verdict is returned. Moreover, the genesis of the Rule demonstrates that it was not promulgated to address this subject."), *rev'd and new trial ordered*, 684 F.2d 272 (4th Cir.) (en banc), *cert. denied*, 103 S. Ct. 216 (1982). See also 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2922, at 340 (1973 & Supp. 1982) ("In a nonjury case Rule 63 applies only 'after . . . findings of fact and conclusions of law are filed.' Thus a new trial ordinarily is required if the judge dies or otherwise becomes disabled after the trial has been completed but before he has filed his findings and conclusions.") (emphasis added; footnote omitted).

4. See *infra* text accompanying notes 24-50.

5. 32 Fed. R. Serv. 2d 678 (4th Cir. 1981).

6. Jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332 (1976).

C. Stanley Blair, who ruled on pretrial motions, empanelled the jury, and presided over the first three weeks of trial.⁷ On April 20, 1980, Judge Blair died and was subsequently replaced by Judge Herbert F. Murray. Judge Murray presided over an additional two weeks of testimony, after which the jury found for plaintiffs.⁸

Defendant appealed from Judge Murray's denial of a motion for a new trial.⁹ In a split decision a Fourth Circuit panel affirmed the substitution of judges and the failure to direct retrial.¹⁰ A divided Fourth Circuit, sitting en banc, reversed and remanded for a new trial.¹¹

This Note will discuss the problems raised by cases such as *Whalen* and the various approaches that have been developed to deal with the substitution of judges in the instance of the death or disability of the presiding judge at trial. A survey of state practice with respect to substitution will be included.¹² It will be demonstrated that the current federal practice requiring retrial in all cases in which the death or disability of the presiding judge occurs prior to return of verdict or filing of findings of fact and conclusions of law often imposes needless costs on parties to suits, particularly in the context of jury trials.¹³ It will be proposed that at least in the jury trial context, discretionary midtrial substitution should be allowed on the grounds that in such settings a successor judge is in as good a position as the predecessor to make any required determinations, and that, particularly with respect to nondemeanor testimony, any differences resulting from substitution would not be unduly prejudicial since the fact finder, the jury, was present during the entirety of the trial.¹⁴

II. THE EXISTING INTERPRETATIONS OF RULE 63

Under the current rules, there are a number of circumstances in which a successor federal judge may take over the duties of the predecessor without the necessity of a trial de novo. It is clear that under the current rules he or she may do so at any time with the consent of all parties.¹⁵ Under Rule 63 substitution is also possible even over the objection of one of the parties after return of a verdict or after the filing of findings of fact and conclusions of law by the predecessor.¹⁶ Furthermore, an oral ruling,¹⁷ written opinion, or memorandum of decision¹⁸ may suffice in lieu of such

7. 32 Fed. R. Serv. 2d 678, 678 (4th Cir. 1981).

8. 684 F.2d 272, 273 n.3 (4th Cir. 1982) (en banc).

9. Judge Murray "reason[ed] that it would be 'inconceivable' to hold substitution over the objection of a party of a new judge before return of verdict absolutely forbidden in a civil action when Rule 25(a) of the Federal Rules of Criminal Procedure explicitly permits such a substitution in a criminal setting." *Id.* at 273 (footnote omitted).

10. 32 Fed. R. Serv. 2d 678 (4th Cir. 1981).

11. 684 F.2d 272 (4th Cir. 1982) (en banc). See *infra* text accompanying notes 123-25.

12. See *infra* text accompanying notes 130-60.

13. See *infra* text accompanying notes 176-94.

14. See *infra* text accompanying notes 199-205.

15. See 7 MOORE'S, *supra* note 2, ¶ 63.05, at 63-8 to 63-9.

16. See *Lever v. United States*, 443 F.2d 350, 351 (2d Cir. 1971); *infra* text accompanying notes 89-94. See also *Bromberg v. Moul*, 275 F.2d 574 (2d Cir. 1960) (Rule 63 not applicable where no findings or conclusions filed by predecessor); *Ten-O-Win Amusement Co. v. Casino Theatre*, 2 F.R.D. 242, 243 (N.D. Cal. 1942) (dismissing Rule 63 motion because no "filing" of findings of fact and conclusions of law by predecessor); *infra* text accompanying notes 81-85.

17. *Bangor & Aroostook R.R. v. Brotherhood of Locomotive Firemen & Enginemen*, 314 F. Supp. 352, 355 (D.D.C. 1970), *aff'd in part and rev'd in part on other grounds*, 442 F.2d 812 (D.C. Cir. 1971).

18. *Makah Indian Tribe v. Moore*, 93 F. Supp. 105 (W.D. Wash. 1950), *rev'd on other grounds*, 192 F.2d 224 (9th Cir. 1951). See also *infra* text accompanying notes 86-88.

findings, so long as the findings and conclusions are sufficiently clear therein, within the language of Federal Rule of Civil Procedure 52(a).¹⁹ Additionally, if a successor judge takes over a case on remand, the successor judge "may be able to make new findings of fact and conclusions of law on the existing record," and the record may, in the sound discretion of the successor, be updated or supplemented.²⁰ The substitution issue may also be appropriate for interlocutory appeal,²¹ although this appears to be the exception, rather than the rule.²² Because no decision prior to *Whalen* had dealt with the operation of Rule 63 in the context of a jury trial,²³ more searching analysis regarding preverdict substitution in jury trials is needed. Moreover, as the discussion below will demonstrate, the legislative history of Rule 63 is at best inconclusive, if not concerning questions of law, then at least concerning questions of policy.

A. *The Ambiguity of the Legislative History*

Although the history of Federal Rule 63 is uncomplicated,²⁴ it is inconclusive with respect to the appropriateness of midtrial substitution in a jury trial setting. The original statement of Congress was contained in Section 953 of the Revised Statutes of 1874.²⁵ As enacted, the statute required that, for purposes of authentication, bills of exceptions be "signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause."²⁶ The United States Supreme Court subsequently held in *Malony v. Adsit*²⁷ that a bill of exceptions authenticated by the trial judge's successor could not be considered on appeal, as the bill of exceptions was "unauthenticated by the signature of the judge who sat at the trial."²⁸

Apparently in an effort to avoid the inflexibility of the Court's interpretation of the law, Congress in 1900 amended²⁹ the existing statute to provide that in a case in which a judge "is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions," the successor judge "shall pass upon said motion and allow and sign such bill of

19. See *infra* text accompanying notes 87-88. The court in *Makah* stated that "Rule 63 must be read in conjunction with Fed. Rules Civ. Proc., rule 52, which . . . provides that 'If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.'" *Makah Indian Tribe v. Moore*, 93 F. Supp. 105, 106 (W.D. Wash. 1950), *rev'd on other grounds*, 192 F.2d 224 (9th Cir. 1951).

20. *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 438 n.20 (5th Cir. 1977) (citing *Rewis v. United States*, 445 F.2d 1303, 1306 (5th Cir. 1971)).

21. The federal courts of appeals have authority to hear interlocutory appeals when the trial judge is "of the opinion that [the order before him or her] involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the termination of the litigation," and so states in writing. 28 U.S.C. § 1292(b) (1976).

22. *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977), appears to be the only federal case resolving a question of substitution under Rule 63 on an interlocutory basis.

23. See *infra* text accompanying notes 51-52.

24. This history is also discussed in *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272, 275 (4th Cir. 1982) (en banc) (Butzner, J., dissenting). See generally 7 MOORE'S, *supra* note 2, ¶ 63.02, at 63-2, 63-3.

25. Act of June 1, 1872, ch. 255, § 4, 17 Stat. 197.

26. *Id.*

27. 175 U.S. 281 (1899).

28. *Id.* at 288.

29. Act of June 5, 1900, ch. 717, 31 Stat. 270 (repealed by Judicial Code Revision Act of 1948, ch. 646, § 39, 62 Stat. 869, 993).

exceptions."³⁰ The statute applied only to "motion [*sic*] for a new trial and applications for the allowance of bills of exceptions,"³¹ and made no distinction between judge and jury trials.

In 1937 the Federal Rules of Civil Procedure were adopted.³² Specifically, Federal Rule 63 superseded the previous statute.³³

In both the panel and en banc *Whalen* decisions the court of appeals split with respect to the significance of this history. Writing for the majority in the panel decision, Judge Butzner interpreted the amendment of the prior statute "to include all of the duties performed by the judge after verdict or judgment,"³⁴ to indicate that "Rule 63 was written to expand, not to restrict, the authority of another judge to proceed following the death of the initial trial judge."³⁵ But Judge Butzner's statement fails to recognize that a successor judge's discretion may be expanded functionally to allow him to perform a wider range of duties after a return of verdict or filing of findings of fact and conclusions of law,³⁶ without expanding the reach of that discretion into earlier portions of the trial. Such an interpretation of Federal Rule 63 is at least as plausible as that offered by Judge Butzner³⁷ and is more consistent with the existing case law.³⁸

Both Judge Murnaghan, dissenting in the two-to-one panel decision, and Judge Butzner, dissenting in the en banc decision, argued that it was the opposing majority that was illegitimately expanding or modifying the scope of the Rule. Judge Butzner wrote in his dissent to the en banc decision that a requirement of a trial de novo when the trial judge dies prior to the return of a jury verdict "can only be created by implication, and we decline to expand the scope of Rule 63 to reach this unwarranted result."³⁹ Conversely, Judge Murnaghan maintained in his dissent to the panel decision that

for [Judge Butzner's] opinion to prevail, there would have to be an expansion of, or a deletion in the language of, Rule 63. . . . The principle requires no elaboration that the

30. *Id.* § 1. The successor's discretion was limited only by the requirement that "the evidence in such cause has been or is taken in stenographic notes" or, alternatively, that "the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions." *Id.* Should those requirements not be met, or for any other reason, the successor judge could "in his discretion grant a new trial to the party moving therefor." *Id.* See also 7 MOORE'S, *supra* note 2, ¶ 63.02, at 63-3 & nn.4, 5.

31. 7 MOORE'S, *supra* note 2, ¶ 63.02, at 63-3.

32. Act of June 19, 1934, ch. 651, 48 Stat. 1064.

33. The original Advisory Committee Note to Federal Rule 63 states: "This rule adapts and extends the provisions of U.S.C., Title 28, [former] § 776 (Bill of exceptions; authentication; signing of by judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded."

34. See 32 Fed. R. Serv. 2d 678, 680 (4th Cir. 1981) (citing Fed. R. Civ. P. 63 advisory committee note).

35. *Id.*

36. Under former 28 U.S.C. § 776 discretionary substitution was limited to motions for new trials and applications for the allowance of bills of exceptions. See *supra* text accompanying note 31.

37. Judge Butzner himself recognized the "logical argument" that Rule 63 "impliedly prohibit[s] substitution before the jury returns its verdict," 32 Fed. R. Serv. 2d 678, 680 (4th Cir. 1981), although he discounted it on the grounds that practicality and common sense dictated a contrary result. *Id.*

38. As this Note will illustrate, courts have been willing to expand the scope of a successor judge's duties arising after findings or verdict, but have been unwilling to do so when the trial had not progressed that far. See *infra* text accompanying notes 81-112.

39. 684 F.2d 272, 281 (4th Cir. 1982) (en banc) (Butzner, J., dissenting). See also 32 Fed. R. Serv. 2d 678, 680 (4th Cir. 1981).

function of a panel of the court, or, indeed, of the court en banc, is to apply the Federal Rules of Civil Procedure as written, and not to amend or modify them.⁴⁰

In writing for the en banc majority, Judge Murnaghan went to extraordinary lengths to support his position, citing records of proceedings of the Advisory Committee on the Civil Rules that took place fifteen years after the adoption of Rule 63.⁴¹ The papers indicate that the Advisory Committee on the Civil Rules, as of 1953, believed "'that under the existing rule, the only way a judge could take up a case which has been tried by another judge but he hasn't decided it, is by stipulation.'" ⁴²

While such information may be of historical and scholarly interest,⁴³ its probative value is doubtful. Because the proceedings took place fifteen years after Rule 63 was drafted, they may not reflect the original intent of the drafters.⁴⁴ More importantly, the cited papers are not part of the published notes of the Advisory Committee intended to accompany the Rules, and it is thus doubtful whether they deserve to share in the persuasive value afforded to the official notes.⁴⁵

Moreover, there is also evidence that the notes were not intended to serve as a persuasive source.⁴⁶ When the creators of such documents did not intend such use, reliance upon them raises particular concern, as the documents are not protected by the procedural safeguards that insure well-reasoned and unambiguous language.⁴⁷

40. 32 Fed. R. Serv. 2d 678, 683-84 (4th Cir. 1981) (Murnaghan, J., dissenting). *Accord* Brennan v. Grisso, 198 F.2d 532, 533 (D.C. Cir. 1952) (in light of fact that trial judge died before filing findings of fact and conclusions of law, court believes "'Rule 63 should not be interpreted so broadly as to dispense with the necessity of a new trial upon the death of the trial judge'").

41. 684 F.2d 272, 275 (4th Cir. 1982) (en banc). The majority described the records as "'fully accessible,'" despite their availability at only four law libraries in the country. *Id.* at 275 n.8.

42. *Id.* at 276 (quoting the proceedings of the Advisory Committee).

43. *Id.* at 282 (Butzner, J., dissenting).

44. The United States Supreme Court addressed a similar problem in *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), in which petitioner resorted to a subsequent congressional conference committee report to support its interpretation of the Consumer Product Safety Act. The Court responded that "[a] mere statement in a conference report . . . as to what the Committee believes an earlier statute meant is obviously less weighty [than expressed legislative intent]." *Id.* at 118 n.13. The Court went on to state, "The less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment. . . . [E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Id.*

Similarly, in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), the Court was confronted with, and rejected, the argument that a reference to a Tenth Circuit decision "inserted into the legislative history [of the Civil Rights Act of 1964] after the completion of the work of both the Senate Committee and House Committee" reflected "either a sound interpretation of the 1964 enactment or a conscious intention of Congress to change existing law." *Id.* at 823-24 (footnotes omitted). *See also* *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979).

These concerns are mitigated to the extent that those persons quoted in the unpublished Advisory Committee minutes were also members of the committee that wrote the original Advisory Committee Note to Rule 63. *See* *Appointment of Committee to Draft Unified System of Equity and Law Rules*, 295 U.S. 774 (1935). *But see infra* text accompanying notes 45-47.

45. The original Advisory Committee stated that "[t]he notes are not part of the rules They have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases." *See* S. Doc. No. 101, 76th Cong., 1st Sess. 215 (1939) (Advisory Committee's Introductory Statement to the Federal Rules of Civil Procedure). It was also stated that the notes "can have no greater force than the reasons which may be adduced to support them." *Id.* In practical effect, of course, the notes have been considered "highly persuasive," notwithstanding the Advisory Committee's disclaimers. *See, e.g.*, 2 MOORE'S, *supra* note 2, ¶ 1.13[2], at 286.

46. They were never officially published. *See* Judge Butzner's dissent, 684 F.2d 272, 281 (4th Cir. 1982) (en banc), citing a letter from Chief Justice Burger to Judge Francis D. Murnaghan, Jr. (Dec. 18, 1981), *id.* at 281 n.6 (Butzner, J., dissenting), to support the proposition that "many years ago the Judicial Conference deemed that the official text of the committee's working papers should not be made accessible for the purpose of litigation."

47. *Cf. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). The Court distinguished

Thus, Judge Butzner is correct in counseling caution in the use of the papers.⁴⁸ This is so despite Judge Murnaghan's insistence that the papers are not necessary to prove his point, but rather "are primarily relevant in that they serve to remove completely any lingering doubt that . . . [the requirement of a new trial] might just possibly be contrary to what the Rules Committee actually intended."⁴⁹ Certainly Judge Murnaghan would not have devoted approximately one-third of his opinion to the papers had they not been intended to serve as a persuasive source.⁵⁰

In sum, the legislative history of Rule 63, while pointing towards a restrictive interpretation of the Rule, is hardly dispositive as to the validity of that view. Nowhere in the history does there appear a considered discussion of the differing interests in new trials in jury trial, as opposed to bench trial, settings. Thus, the history is particularly unpersuasive with respect to a jury case such as *Whalen*.

B. The Case Law

Like the legislative history of Rule 63, the case law in the area of midtrial substitution has generally failed to acknowledge any distinction between jury and nonjury trials. As a consequence, the majority and dissenting opinions in the *Whalen* en banc decision evince fundamental disagreement with respect to the significance of the case law interpreting the Rule. To the majority, it was a simple matter: "Research has failed to turn up a single case of substitution before verdict where one of the parties refused to consent."⁵¹ But the dissent described the case law in a different way: "[N]o case precisely on point has been called to our attention. . . . [P]recedent prohibiting substitutions in nonjury trials does not answer the question presented by this [jury trial] case."⁵²

At this juncture, a review of the relevant case law will serve to illustrate two points. First, it will become apparent that expansions of Rule 63 principles have usually been limited to duties performed by the successor judge *after* return of a jury verdict or filing of findings of fact and conclusions of law by the original trial judge. Second, it will be noted that the federal cases decided prior to *Whalen* made no distinction between jury and nonjury trials primarily because such a distinction appeared irrelevant under the language of Rule 63, and not necessarily as a matter of logic or policy.

1. Cases Decided on General Principles

Although prior to *Whalen* no federal case had dealt with the duties and discretion of a successor judge in a jury trial setting in which substitution became necessary before return of a verdict, a significant number of cases in other settings have

"subsequent legislation declaring the intent of an earlier statute" from statements in subsequent conference reports; the former is significantly more weighty since with respect to it "Congress has proceeded formally through the legislative process." *Id.* at 118 n.13.

48. 684 F.2d 272, 281 (4th Cir. 1982) (en banc) (Butzner, J., dissenting).

49. *Id.* at 275 n.8.

50. *Id.* at 275-77.

51. *Id.* at 274-75.

52. *Id.* at 280.

interpreted or relied upon Rule 63.⁵³ A number of federal cases in areas such as bankruptcy⁵⁴ and naturalization,⁵⁵ as well as state⁵⁶ and English⁵⁷ decisions, were also available as precedents. With two notable exceptions,⁵⁸ all the cases following the promulgation of Rule 63 and decided under principles similar to those embodied in Rule 63 have refused to extend a successor judge's discretion into that portion of the trial preceding filing of findings of fact and conclusions of law by the first judge, or, in a jury trial, prior to the return of a verdict.

As early as 1834 the United States Supreme Court set the background for these issues in *In re Life & Fire Insurance Co. of New York v. Wilson's Heirs*.⁵⁹ The district court had rendered judgment in favor of plaintiffs, but the trial judge died two years later without ever signing the judgment, bringing into play a local district court rule requiring all judgments to be signed.⁶⁰ Plaintiffs requested that the trial judge's successor sign the judgment. He refused, and plaintiffs sought issuance of a writ of mandamus directing him to do so. When directed by the Supreme Court to explain his refusal, the successor judge gave as one reason that because the law required a 'judgment' to be signed, no 'judgment' had ever been entered.⁶¹ Thus, his act of signing would have been equivalent to rendering a judgment himself, which he could not do without having heard the case.⁶²

The Supreme Court disagreed, heeding the arguments of plaintiffs that the court was the same, though the judges had changed.⁶³ Any responsibilities incumbent upon a trial judge at the time he leaves office fall identically upon his successor, unless there is a need for a new trial.⁶⁴ Thus, as the Court concluded, the successor judge

53. See, e.g., *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982); *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426 (5th Cir. 1977); *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977); *Havey v. Kropp*, 458 F.2d 1054 (6th Cir. 1972); *Lever v. United States*, 443 F.2d 350 (2d Cir. 1971); *Bromberg v. Moul*, 275 F.2d 574 (2d Cir. 1960); *Brennan v. Grisso*, 198 F.2d 532 (D.C. Cir. 1952); *Morton v. Ortho Pharmaceutical Corp.*, 550 F. Supp. 416 (E.D. Tenn. 1982); *Berry v. School Dist.*, 494 F. Supp. 118 (W.D. Mich. 1980); *Bangor & Aroostook R.R. v. Brotherhood of Locomotive Firemen & Enginemen*, 314 F. Supp. 352 (D.D.C. 1970), *aff'd in part and rev'd in part on other grounds*, 442 F.2d 812 (D.C. Cir. 1971); *Makah Indian Tribe v. Moore*, 93 F. Supp. 105 (W.D. Wash. 1950), *rev'd on other grounds*, 192 F.2d 224 (9th Cir. 1951); *In re Garcia*, 65 F. Supp. 143 (W.D. Pa. 1946); *Burrill v. Shaughnessy*, 9 Fed. R. Serv. 918 (N.D.N.Y. 1946); *Ten-O-Win Amusement Co. v. Casino Theatre*, 2 F.R.D. 242 (N.D. Cal. 1942).

54. *Dickman v. Schoenfeld (In re Schoenfeld)*, 608 F.2d 930 (2d Cir. 1979); *Giffen v. Vought*, 175 F.2d 186 (2d Cir. 1949); *St. Louis S.W. Ry. v. Henwood*, 157 F.2d 337 (8th Cir. 1946).

55. *In re Garcia*, 65 F. Supp. 143 (W.D. Pa. 1946).

56. See *infra* notes 130-60.

57. *Coleshill v. Manchester Corp.*, [1928] 1 K.B. 776, 785.

58. *St. Louis S.W. Ry. v. Henwood*, 157 F.2d 337 (8th Cir. 1946). *In re Garcia*, 65 F. Supp. 143 (W.D. Pa. 1946), is sometimes cited as another case in which a successor judge continued a case prior to filing of findings by the original trial judge. See, e.g., Case Comment, *The Case of the Dead Judge: Fed. R. Civ. P. 63*: *Whalen v. Ford Motor Credit Co.*, 67 MINN. L. REV. 827, 830 (1983). It is not clear from the language of the case, however, whether either party objected. See *In re Garcia*, *supra*, at 143-44 ("[T]his court in its discretion *agreed* to make disposition of the case on the record as it previously existed. This has been done in accordance with [Federal Rule 63]") (emphasis added).

59. 33 U.S. (8 Pet.) 291 (1834).

60. *Id.* at 293.

61. "All judgments rendered . . . must be signed by the judge before execution can be taken out upon them; in other words, the judgments are not complete, or rather are no judgments at all, until they are so signed." *Id.*

62. "[W]ere I to give validity to what is here called a judgment, by affixing to it my signature, would it not be to pronounce on the rights of the parties whose cause I have never heard?" *Id.* at 294.

63. "The court remains the same, and the charge [*sic*] of the incumbents cannot and ought not, in any respect, to injure the rights of litigant parties." *Id.* at 303.

64. "A court never dies. . . . It is the duty of the successor to perfect and carry into effect *all acts begun by his predecessor*, and pending in the court at the time of his appointment." *Id.* at 297 (emphasis added).

was obligated either to grant a new trial or to sign the judgment; because he had denied plaintiffs a new trial, he was required to sign the judgment, and the writ of mandamus would issue.⁶⁵

Wilson's Heirs was decided thirty-eight years prior to the earliest statutory predecessor of Federal Rule 63.⁶⁶ The case has been cited in more modern times, however, to support the proposition that a court is a continuing institution, independent, at least in a theoretical sense, of the individual judges of whom it is comprised.⁶⁷ Such a view will, in some circumstances, support liberal allowance of midtrial substitution.⁶⁸

Of course, a view of courts *qua* continuing entities breaks down if carried to an extreme; a successor judge, though an integral element of the same theoretical "court," obviously will not be possessed of the same knowledge of cases in progress at the time he or she joins the court. Indeed, the successor also may know less or more of the substantive law of the jurisdiction than did the predecessor judge.

In order to fashion, then, a workable theory to govern midtrial substitution, the notion of courts as continuing entities must be reconciled with the inevitable differences between the original and successor judges. One solution is to interpret Rule 63 to require affirmatively, unless fairness dictates otherwise, that a successor judge take up a case after return of a verdict or filing of findings of fact and conclusions of law.⁶⁹ Such a construction of the Rule would be based upon the proposition that Rule 63 allows the granting of a new trial by the successor judge only "if such other judge is satisfied that he *cannot* perform those duties because he did not preside at the trial or for any other reason."⁷⁰ In other words, if the successor judge is legally capable of continuing with the trial, he must do so. Because it makes little sense to force a new trial without good cause, this proposed construction of Rule 63 is more reasonable than other possible constructions.

In *St. Louis Southwestern Railway v. Henwood*⁷¹ the Eighth Circuit adopted a virtually identical approach in a bankruptcy case not governed by Rule 63. In the absence of binding authority on point, the court undertook "an examination of the reasoning underlying the opinions and producing their results"⁷² in the area of midtrial substitutions. The court concluded that "only where justice . . . require[s]" should a retrial be mandated upon the necessity of substitution of judges.⁷³ "Where it is necessary . . . to gain . . . absent information," the court added, "he [the successor judge] must set back the litigation to the place where he can obtain it."⁷⁴ Thus,

65. *Id.* at 303-05.

66. *See supra* note 25.

67. *See St. Louis S.W. Ry. v. Henwood*, 157 F.2d 337, 342 (8th Cir. 1946); *In re Marriage of Ayers*, 82 Ill. App. 3d 164, 167, 402 N.E.2d 401, 403 (1980); *Lance v. Slusher*, 74 Ohio App. 361, 364, 59 N.E.2d 57, 58 (1944).

68. *St. Louis S.W. Ry. v. Henwood*, 157 F.2d 337, 342 (8th Cir. 1946).

69. *See Lever v. United States*, 443 F.2d 350, 351 (2d Cir. 1971); *infra* text accompanying notes 87-94. *See also Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 438 n.20 (5th Cir. 1977); *Berry v. School Dist.*, 494 F. Supp. 118 (W.D. Mich. 1980); *infra* note 110.

70. FED. R. CIV. P. 63 (emphasis added).

71. 157 F.2d 337 (8th Cir. 1946).

72. *Id.* at 342.

73. *Id.*

74. *Id.*

the court found that the successor judge had the power to proceed, within his sound discretion, "upon the record as it came to him."⁷⁵

In a more recent case, however, the Second Circuit took a different approach.⁷⁶ In *Dickman v. Schoenfield* (*In re Schoenfield*), a bankruptcy case like *Henwood*, the court relied not only upon "general principles of law," but also heavily upon Federal Rule 63 and the reasoning of the cases interpreting it.⁷⁷ The court came to the conclusion that the crucial question "whether [the district court] erred in ordering a new trial . . . when the term of the presiding bankruptcy judge expired before the parties had finished presenting their evidence,"⁷⁸ must be answered in the negative.

[A]lthough the situation is rare, the legal principle guiding this Court's approach to [midtrial substitution] is basic and familiar. That principle, simply stated, is that the factfinder who is given the opportunity to observe witnesses as they testify is in a better position to make factual findings based on that evidence than is the factfinder who is restricted to a written record of the same testimony.⁷⁹

The "legal principle" enunciated in *Schoenfield* is open to little question, as far as it goes. But merely to state the principle is not to deny the existence of countervailing principles that may outweigh it. A judge present for the entirety of a trial may be in a better position than a substitute to make judgments about the case, but this does not necessarily mean that the incremental gain in the quality of the judge's decisions is worth the expense of a trial de novo. Moreover, *Schoenfield* was a nonjury case. The rationale articulated by the *Schoenfield* court is arguably inapplicable to jury trials since the jury has observed the witnesses and testimony and is still present after substitution of the judge. In addition, there are potential constitutional concerns to be taken into account,⁸⁰ although these have remained largely unexplored by the cases.

The existence of Rule 63 has, over the years, permitted courts to escape these issues with facile reliance on statutory construction and unpersuasive precedent, as the *Whalen* en banc opinion amply demonstrates. Additionally, and regrettably, no cases prior to *Whalen* raised these issues in the more problematic context of a jury

75. *Id.* at 342-43. The court also held that the successor judge had not abused his discretion in so doing. *Id.* at 343.

76. *Dickman v. Schoenfield* (*In re Schoenfield*), 608 F.2d 930 (2d Cir. 1979).

77. *Id.* at 933. The court stated:

Unlike many of the Federal Rules of Civil Procedure, Rule 63 has not been incorporated into the bankruptcy rules. Rule 81(a)(1), Fed. R. Civ. P., specifically declares that the rules of civil procedure do not apply to proceedings in bankruptcy "except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States."

Id. (footnote omitted). After conceding the noncontrolling nature of the civil rules, the court simply asserted that "it is both logical and useful to consult the rule and the cases interpreting it and to distill from these sources whatever principles can contribute to the reasoned decision of this appeal." *Id.* at 933-34.

78. *Id.* at 933.

79. *Id.* at 935. Compare, however, the cases discussed *infra* text accompanying notes 81-129, with *Giffen v. Vought*, 175 F.2d 186 (2d Cir. 1949), in which the court summarily stated that a successor referee who signed formal findings of fact and conclusions of law on the basis of an "extensive opinion clearly setting forth [the trial referee's] view of both the facts and the law," acted "quite in line with precedent and [Federal Rule 63]." Apparently, a successor bankruptcy judge may make findings that are "not important" to the case, so long as the important conclusions are made by the trial judge. *Id.* at 189. See also *Dickman v. Schoenfield* (*In re Schoenfield*), 608 F.2d 930, 934-35 (2d Cir. 1979).

80. Midtrial substitution raises both due process and seventh amendment concerns. See, e.g., *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899) (implying that jury trial requires "superintendence" of one judge throughout the proceedings). But see *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272, 284-85 (4th Cir. 1982) (en banc) (Butzner, J., dissenting) (finding no seventh amendment bar to midtrial substitution); *Lykes Bros. S.S. Co. v. Benben*, 601 S.W.2d 418 (Tex. Civ. App. 1980) (state court finds no due process bar to midtrial substitution); *infra* note 193.

trial. Nevertheless, a review of the cases decided directly under Rule 63 will help to define the issues involved in judicial substitution. Analysis of the cases will also demonstrate a number of the problems inherent in the current construction of Rule 63.

2. Cases Decided Under the Governance of Federal Rule 63: *Restrictive Interpretation of the Rule*

The earliest federal case discussing the requirements of Federal Rule 63 is *Ten-O-Win Amusement Co. v. Casino Theatre*,⁸¹ in which plaintiff sued for infringement of a design patent and for unfair competition. The case was tried before the court, and the presiding trial judge died after directing entry of judgment for plaintiffs, but before filing findings of fact and conclusions of law.⁸² Defendant requested a new trial, asserting that since the trial judge had not filed findings of fact before his death, a successor judge had authority neither to do so nor to enter judgment, absent the consent of the parties.⁸³

The court agreed, relying on the clarity of the Rule's language and two state cases involving like circumstances.⁸⁴ The successor judge held that "[a]s findings of fact and conclusions of law herein were not 'filed' by [the trial judge] before his death, I have no power to sign and file them now. A new trial will be therefore granted"⁸⁵ Apparently this decision was never appealed.

Eight years later in *Makah Indian Tribe v. Moore*⁸⁶ Rule 63 was read to give successor judges the power to sign a formal judgment despite the lack of filing of findings of fact and conclusions of law when, within the language of Federal Rule of

81. 2 F.R.D. 242 (N.D. Cal. 1942).

82. The trial judge had announced that judgment for plaintiffs would be entered "upon the filing of approved findings of fact and conclusions of law," but died without signing them. *Id.* at 243.

83. *Id.*

84. *Id.* The cases relied upon were *Mace v. O'Reilly*, 70 Cal. 231, 11 P. 721 (1886), and *Chiricahua Ranches Co. v. State*, 44 Ariz. 559, 39 P.2d 640 (1934). *Mace* involved an action for malicious prosecution in which the plaintiff sought \$5000 in damages. The case was tried before the court, and the trial judge entered judgment for plaintiff in the amount of \$100. The case was unusual in that defendant, apparently pleased with such a small loss, fought the grant of a new trial. Nevertheless, the court held that, absent concurrence by both parties, filing of findings of fact and conclusions of law by someone other than the trial judge was improper, and a trial de novo was required. 70 Cal. 231, 236, 11 P. 721, 723 (1886).

In *Chiricahua Ranches* the jury returned verdicts on all counts for defendants in a suit instituted by plaintiffs against a livestock sanitary board over the seizure of some of plaintiff's animals. A state statute required a "formal written judgment" to be entered before judgment would be considered "rendered," but no such written judgment was entered prior to the trial judge's death about one month after return of the verdict. The successor judge denied a motion for a new trial, and plaintiffs appealed. The Supreme Court of Arizona not only affirmed on procedural grounds, plaintiffs having failed to request a new trial within the statutory period, but also held that in future actions

when after the trial of any case, before either the jury or the court, the judge who tried the case has vacated his office without rendering judgment . . . a motion for new trial may be made, and he [the successor judge] will then determine it on its merits. If the trial had been before the court, and no findings of fact had been filed by his predecessor, it would be an abuse of discretion to refuse the new trial. Under any other circumstances, the granting or refusing of the motion would be subject to review . . . under the general principles of law governing such motions.

44 Ariz. 559, 567, 39 P.2d 640, 643 (1934). The court thus distinguished between jury trials and trials to the court, with a less generous attitude towards trials de novo in the former. Note, however, that both *Mace* and *Chiricahua Ranches* were decided under state law without reference to either federal cases or to federal law then in effect.

85. 2 F.R.D. 242, 243 (N.D. Cal. 1942). This decision came before Federal Rule 52(a) was amended to allow in certain circumstances opinions and memoranda to substitute for separate findings of fact and conclusions of law. *See infra* note 87.

86. 93 F. Supp. 105 (W.D. Wash. 1950), *rev'd on other grounds*, 192 F.2d 224 (9th Cir. 1951).

Civil Procedure 52(a), a written opinion or memorandum of decision by the trial judge is sufficiently detailed.⁸⁷ This result has been followed in several subsequent cases⁸⁸ on the implicit principle that in the interest of expediency, a successor judge should, if possible within the constraints of the administration of justice, decide those cases brought before him. Eventually, this principle was adopted explicitly by the Second Circuit in *Lever v. United States*,⁸⁹ in which the court read Rule 63 to mandate that “[o]nly if the second judge is satisfied that he *cannot* perform the duties imposed on him by the Federal Rules of Civil Procedure with respect to the particular case before him may he, in his discretion, grant a new trial.”⁹⁰ The court noted that the “‘generous attitude’”⁹¹ evinced by some other courts about granting new trials under Rule 63 was “not entirely consistent with the [view taken in *Lever*], . . . or with the language of the rule as [the *Lever* court] read it.”⁹² Ultimately, this lack of a predisposition towards new trials appears to have been based on the fact that in *Lever* the trial judge “specifically noted his evaluation of the credibility of the witnesses, thus enabling another judge to examine the record with a discriminating eye.”⁹³

The court thus went beyond reading Rule 63 as a purely discretionary rule to intimate that, particularly when the credibility of witnesses is not a problem, the successor may actually be required to rule on post-trial motions after filing findings of fact and conclusions of law.⁹⁴ Yet, whereas *Makah* and *Lever* may have expanded the universe of cases in which discretionary substitution can or must take place, it is

87. Rule 52(a) requires that “[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon,” but contains the proviso that “[i]f an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.” That proviso, added in 1946 and effective in 1948, apparently came about because “[u]nder original Rule 52(a) some courts ha[d] expressed the view that findings and conclusions could not be incorporated in an opinion.” Fed. R. Civ. P. 52 advisory committee note (1946).

88. See *Thompson v. Sawyer*, 678 F.2d 257, 269 n.6 (D.C. Cir. 1982) (*Makah* supports “the proposition that the successor judge is empowered to enter judgment based on his predecessor’s findings”); *Hawkins v. Ohio Bell Tel. Co.*, 93 F.R.D. 547, 553 (S.D. Ohio 1982) (*Makah* cited to support the proposition that “the courts have accepted transcribed oral transcripts of a decision delivered from the bench as adequate to fulfill the requirements of Fed.R.Civ.P. 52(a)”). Cf. *Bangor & Aroostook R.R. v. Brotherhood of Locomotive Firemen & Enginemen*, 314 F. Supp. 352, 356 (D.D.C. 1970) (successor judge holds that “[t]he Court is satisfied that clearly stated conclusions of law were reached by [the trial judge] and that this Court can perform its duties on the basis of [the trial judge’s] rulings”). But cf. *Havey v. Kropp*, 458 F.2d 1054 (6th Cir. 1972). In *Havey* no decision was announced prior to the trial judge’s death. After an unfiled written opinion was found granting the petitioner a writ of habeas corpus, the successor judge held a limited evidentiary hearing and denied the writ. The court of appeals upheld the successor judge’s actions, noting that it was possible that the reason the original judge’s opinion had not been filed was “the existence of some doubt in the mind of the author.” *Id.* at 1055. The *Bangor & Aroostook* decision was distinguished because in it the trial judge’s decision had been orally “announced,” thereby reducing the likelihood that the trial judge had consciously reserved judgment on the issues of the case. *Id.*

89. 443 F.2d 350 (2d Cir. 1971).

90. *Id.* at 351.

91. *Id.* (quoting *Brennan v. Grisso*, 198 F.2d 532 (D.C. Cir. 1952)). The court also distinguished *Brennan* as a case in which “the trial judge did not have the benefit of comprehensive findings of fact or explicit judgments with respect to the credibility of witnesses.” *Id.* at 351. See also *infra* text accompanying notes 95–99.

92. 443 F.2d 350, 351 (2d Cir. 1971).

93. *Id.*

94. Note also that the Second Circuit Court of Appeals in *Dickman v. Schoenfield* (*In re Schoenfield*), 608 F.2d 930 (2d Cir. 1979), based its inclination towards new trials in the bankruptcy context largely upon a concern over the credibility of witnesses: “[T]he factfinder who is given the opportunity to observe witnesses as they testify is in a better position to make factual findings based on that evidence than is the factfinder who is restricted to a written record of the same testimony.” *Id.* at 935. Obviously, such considerations would decrease in importance when credibility is not at issue or is sufficiently unimportant to have little likelihood of affecting the outcome of the case. See also *St. Louis S.W. Ry. v. Henwood*, 157 F.2d 337 (8th Cir. 1946); *infra* text accompanying notes 202–05.

important to note that in neither case was such discretion extended to allow substitution prior to a decision by the finder of fact; the successor judge's powers were still limited to ruling on post-trial motions and various ministerial functions. Thus, any expansion of Rule 63 that resulted from these cases is, at best, limited.

Moreover, despite the marginally less restrictive construction given Rule 63 by *Makah* and *Lever*, each of the federal cases between 1950 and 1970 interpreting Rule 63 found a new trial required when the trial judge died before filing findings of fact and conclusions of law. In *Brennan v. Grisso*⁹⁵ plaintiff-appellant claimed to have divorced defendant-appellee in Florida; the validity *vel non* of the divorce was critical in the case.⁹⁶ The case was tried to the court. The trial judge "expressed orally the belief that appellant had not been domiciled in Florida and that the divorce was invalid . . . [but] filed no findings of fact or conclusions of law and no opinion or memorandum."⁹⁷ The trial judge died before ruling on appellant's motion for a new trial.⁹⁸ After the successor judge denied the motion, the court of appeals reversed and ordered a new trial, holding:

We do not know whether [the trial judge] would have denied the motion . . . or, in the light of the additional evidence it offered, would have changed his previously expressed views regarding appellant's domicile. Because he had heard the witnesses he was better qualified . . . to determine the credibility and weight of the evidence . . . In view of these considerations, we think Rule 63 should not be interpreted so broadly as to dispense with the necessity of a new trial upon the death of the trial judge.⁹⁹

Similarly, in *Bromberg v. Moul*¹⁰⁰ the court summarily dismissed plaintiff's argument that Federal Rule 63 allowed the successor judge to rule on the merits of the case; as no findings of fact or conclusions of law had been filed, the court stated that "it is plain that this rule [Rule 63] is inapplicable."¹⁰¹ Interestingly, the trial court's successor judge was adjudged to have acted "entirely appropriate[ly]"¹⁰² in treating the prior trial record as "supporting affidavits" within the language of Federal Rule of Civil Procedure 56(a).¹⁰³ Thus, when a trial de novo is required under Rule 63, a

95. 198 F.2d 532 (D.C. Cir. 1952).

96. Plaintiff was suing for partition of real estate in the District of Columbia claimed to be held in a tenancy by the entirety.

97. 198 F.2d 532, 532 (D.C. Cir. 1952). The language "and no opinion or memorandum" seems to imply acceptance of the reasoning of *Makah Indian Tribe v. Moore*, 93 F. Supp. 105 (W.D. Wash. 1950), *rev'd on other grounds*, 192 F.2d 224 (9th Cir. 1951). See *supra* text accompanying notes 86-88.

98. She filed a "Motion to Enter Judgment for the Plaintiff or in the Alternative to Grant a New Trial or to Reopen the Case to Permit Introduction of Further Testimony and Documentary Evidence Bearing on the Issues." In conjunction with the motion appellant submitted to the court "an exhibit that gave further support to her claim of Florida domicile." 198 F.2d 532, 532 (D.C. Cir. 1952).

99. *Id.* at 532-33.

100. 275 F.2d 574 (2d Cir. 1960).

101. *Id.* at 576 n.1. The court also dismissed, for lack of evidence, plaintiff's claim that the trial judge had rendered a decision.

102. *Id.* at 576.

103. Federal Rule 56(a) states:

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

litigant apparently may use the transcript of the prior proceedings in support of a motion for summary judgment.¹⁰⁴

Such an approach seems entirely consistent with the policy behind Federal Rule 56, namely, to avoid protracted litigation when there can be only one valid result.¹⁰⁵ Courts in non-Rule 63 contexts have utilized court transcripts in support of Rule 56(a) motions for summary judgment.¹⁰⁶ Moreover, courts have the power to grant summary judgment after remand from an appellate court.¹⁰⁷ This points to an intent that Rule 56(a) summary judgment be granted in any and all appropriate situations.

Additionally, the use of prior trial transcripts as supporting affidavits in a motion for summary judgment does not appear to transgress any concerns addressed by Rule 63. If viewed as a restrictive device, proscribing substitution in certain circumstances, Rule 63 prevents judges who do not have sufficient knowledge of the facts or issues of a case from determining the rights of the parties to the dispute. But summary judgment may be granted only when it appears to the court "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."¹⁰⁸ If that is the case, a party's interest in a trial de novo is particularly small; only the same result could obtain.¹⁰⁹

Alternatively, when Rule 63 is seen as an enabling device, allowing substitution under prescribed circumstances,¹¹⁰ then the primary interest being protected is a party's interest in the most expeditious litigation possible given the demands of justice and due process. Once again, such interests are hardly impinged upon by allowing summary judgment in cases in which there can be only one legally valid result.¹¹¹

Nevertheless, regardless of this minor procedural twist allowed by *Bromberg*, both *Bromberg* and *Brennan* represent essentially mechanical applications of the restrictive interpretation of the Rule. And as they both involved trials to the court, they, like *Schoenfeld*, are applicable to jury trials only to the extent that Rule 63 fails to distinguish between bench and jury trials. Such mechanical applications of precedent are of little persuasive value in determining the desirability of substitution in jury trials, as has become apparent from the difficulties that the Fourth Circuit

104. Note, however, that in *Bromberg* the court of appeals reversed on evidentiary grounds the successor judge's decision to grant summary judgment in favor of plaintiff. 275 F.2d 574, 576-78 (2d Cir. 1960).

105. "Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact." FED. R. CIV. P. 56 advisory committee note. See also 6 MOORE's, *supra* note 2, ¶ 56.09, at 56-167 ("[T]he real function of summary judgment is to go beyond the pleadings and present matters . . . for the purpose of showing that despite issues of fact raised by the pleadings there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.").

106. See 6 MOORE's, *supra* note 2, ¶ 56.11[1-8], at 56-204 n.3.

107. *Id.* ¶ 56.27 [3].

108. FED. R. CIV. P. 56(c).

109. If there was any evidence presented to the original trial judge to which the successor is not privy, that would presumably raise an "uncertainty" as to the existence of a material issue of fact, thus militating against granting the motion for summary judgment. See 10 C. WRIGHT & A. MILLER, *supra* note 3, § 2712, at 580-81 (1983).

110. For an example of a court's explicitly adopting this view, see *St. Louis S.W. Ry. v. Henwood*, 157 F.2d 337, 342 (8th Cir. 1946). *Accord* *Lever v. United States*, 443 F.2d 350, 351 (2d Cir. 1971).

111. If summary judgment is granted, it is always subject to review on appeal. See, e.g., *supra* note 104. Despite the obvious usefulness of the Rule 56(a) "supporting affidavit" language as a procedural tool in the Rule 63 context, research has failed to uncover any federal cases other than *Bromberg* in which the tactic is discussed.

encountered in attempting to incorporate cases like *Brennan* and *Bromberg* into a sensible approach to midtrial substitution.¹¹²

3. *Judicial Dissatisfaction with a Strict Interpretation of Rule 63*

In 1977, in *Arrow-Hart, Inc. v. Philip Carey Co.*¹¹³ the Sixth Circuit first explicitly articulated evidence of dissatisfaction with the requirements of Rule 63. Plaintiff had sued five defendants in a diversity action for breach of a construction contract worth nearly one million dollars. After thirty-seven days of depositions and trial and the completion of a five-thousand page transcript, the trial judge died without making formal findings.¹¹⁴

Four of the five defendants agreed "to decide the case on the transcript of the former trial,"¹¹⁵ but the fifth, Philip Carey, refused.¹¹⁶ The Sixth Circuit agreed to hear the case on interlocutory appeal,¹¹⁷ and held that despite its "reluctan[ce] to hold that [the successor judge] does not have the discretion to dispose of the present case on the basis of the evidence on file, together with any additional competent evidence that the parties may desire to submit,"¹¹⁸ it must so hold and thus require a new trial. In explaining its reluctance, the court pointed to statistics quantifying the court's "staggering caseload";¹¹⁹ the court obviously felt that the accepted construction of Rule 63 at best failed to mitigate, and at worst exacerbated, the court's overload.¹²⁰ Indeed, one might speculate that the hostility which the *Arrow-Hart* court showed toward retrial stemmed from a perception that Philip Carey's refusal to consent to continuation was based only on a desire to delay and not on substantive fears of injustice.¹²¹

The opinions in the *Whalen* litigation represent one of only two federal cases since *Arrow-Hart* in which the court has been directly presented with the question of the circumstances under which Rule 63 requires a trial de novo,¹²² and they present

112. The Sixth Circuit encountered similar problems in *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977), albeit in the context of a bench trial. See *infra* text accompanying notes 113-21.

113. 552 F.2d 711 (6th Cir. 1977).

114. The case was tried to the court. *Id.* at 711-12.

115. *Id.* at 712.

116. This was despite some overt hints from the bench to counsel for Philip Carey "that it would facilitate the dispatch of judicial business in the district" to drop the demand for a new trial. *Id.* at 712-13.

117. See *supra* notes 21-22.

118. 552 F.2d 711, 713 (6th Cir. 1977). Note that the court of appeals also ruled that the prior trial testimony of witnesses who are unavailable at the time of the second trial may be treated as depositions in accordance with Federal Rule of Civil Procedure 32(a)(3). *Id.*

119. *Id.* The court noted that in calendar year 1976, 769 cases per judge had been filed in the district and that the court finished the year with a backlog of over 3200 cases. *Id.*

120. *Id.* A similar sentiment was expressed by the panel majority in *Whalen*. See 32 Fed. R. Serv. 2d 678, 679 (4th Cir. 1981) (the successor judge's decision to continue the trial on the prior transcripts "conserved expenses to the parties and the government, and promoted the efficient administration of a busy court").

121. The same conclusion could be drawn regarding Judge Butzner's opinions in *Whalen*, although in neither *Whalen* nor *Arrow-Hart* was such a belief incorporated into an opinion.

122. But see *Sea-Gate, Inc. v. United States*, 35 Fed. R. Serv. 2d 1392 (Cl. Ct. 1983). In *Sea-Gate* the court applied Claims Court Rule 63(a), a rule substantially equivalent to Federal Rule 63, and found a new trial required when the trial judge became disabled before filing findings of fact and conclusions of law. The court noted in a footnote that this is the same procedure followed under Court of Claims Rule 14(a). *Id.* at 1394 n.1. Two other post-*Arrow-Hart* federal cases decided under the Federal Rules have discussed Rule 63, but only in the context of determining when a successor judge

far less than enthusiastic endorsements of a restrictive reading of Rule 63. On initial review a two-to-one Fourth Circuit panel decision adopted a particularly expansive reading of Rule 63, holding that the Rule allowed discretionary substitution in jury trials at any time, even before the return of a verdict.¹²³ But upon rehearing en banc,¹²⁴ a six-judge majority opted for reversal of the panel decision. Four judges joined Judge Murnaghan's majority opinion, but Chief Judge Winter concurred specially, noting, "Except for the unseemliness in this case, and the uncertainty in future litigation, of having this issue decided by an equally divided court, I could readily be persuaded to adopt the views espoused by [the dissenters]."¹²⁵

A decision directly contrary to the outcome of the *Whalen* en banc decision is *Morton v. Ortho Pharmaceutical Corp.*,¹²⁶ in which the District Court for the Eastern District of Tennessee denied a motion for mistrial and new trial upon the death of the trial judge prior to return of verdict in a jury trial. The reasoning in *Morton* was virtually identical to that in the panel majority decision in *Whalen*,¹²⁷ the court distinguished *Arrow-Hart* as a nonjury trial, the rationale of which is inapplicable when "the judge is not the factfinder."¹²⁸ Finally, the court balanced a number of interests including the expense of retrial in concluding that "[t]he jury, as triers of the facts, have heard the evidence, and should be able to come to a decision based on the law charged by a judge who did not hear the proof."¹²⁹ At first glance, then, cases like *Whalen* present a difficult issue the outcome of which cannot be predicted easily. On the other hand, given the position taken by a majority of federal courts that have considered the issue and the seeming facial clarity of Rule 63, it appears that, at least until it is modified, Rule 63 is likely to continue to be interpreted as disallowing substitution prior to return of a verdict or filing of findings of fact and conclusions of law in jury and nonjury trials alike. Cases like *Morton* and *Whalen* simply underscore

has the power to order a new trial, and not when the successor is required to do so. In *Berry v. School Dist.*, 494 F. Supp. 118 (W.D. Mich. 1980), the successor judge came into the case when the trial judge withdrew for health reasons after filing findings of fact and conclusions of law. The successor judge held that while "[a]n intervening decision which affects the law of the case has been recognized as a proper ground for a motion for new trial under Rule 63," the intervening decisions at issue were not, relative to the trial judge's findings, sufficiently inconsistent to render the successor judge incapable of carrying out the prior judge's duties within the language of Rule 63. *Id.* at 120.

In *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982), the court summarily stated that it would not reach the issue of whether the trial judge's findings sufficed to allow a successor judge to enter judgment, when the successor judge chose not to do so. The court based this conclusion on the reasoning that "Rule 63 at most gives a successor judge the power to enter judgment; it does not obligate him to do so." *Id.* at 269 (emphasis in the original).

This language probably should not be taken at face value, though, since the court went on to discuss the appropriateness of the successor judge's decision to grant a new trial, noting particularly that the trial judge had announced that he would amplify upon his findings, but died before having an opportunity to do so. *Id.* Furthermore, several cases cited by the court to support its position contain language to the effect that a successor judge must enter judgment on the record of the prior proceedings unless he is reasonably unable to do so. *Id.* at 269 n.6 (citing both *Bangor & Aroostook R.R. v. Brotherhood of Locomotive Firemen & Enginemen*, 314 F. Supp. 352 (D.D.C. 1970), and *Makah Indian Tribe v. Moore*, 93 F. Supp. 105 (W.D. Wash. 1950), *rev'd on other grounds*, 192 F.2d 224 (9th Cir. 1951)). See also *supra* text accompanying notes 69-73.

123. See 32 Fed. R. Serv. 2d 678 (4th Cir. 1981).

124. See 684 F.2d 272 (4th Cir. 1982).

125. *Id.* at 279 (Winter, C.J., concurring specially).

126. 550 F. Supp. 416 (E.D. Tenn. 1982).

127. Although *Morton* was decided more than three months after the *Whalen* en banc decision, *Whalen* was not addressed by the *Morton* court.

128. 550 F. Supp. 416, 417-18 (E.D. Tenn. 1982).

129. *Id.* at 417.

the need for an amendment to Rule 63 definitively resolving the conflict between the costs of litigation and the current majority reading of the Rule.

C. State Practice with Respect to Substitution Due to a Trial Judge's Death or Disability

A survey of state practice¹³⁰ with respect to substitution of judges reveals that the approach taken by Federal Rule 63 is by far the single most common practice. Thirty states,¹³¹ plus Puerto Rico,¹³² have statutes or rules either identical or substantially equivalent to Rule 63. Of the remaining states, only twelve, plus the District of Columbia, appear to have no statute or rule of court directly on point.¹³³ The remaining eight states¹³⁴ have statutes that differ in various significant respects from Rule 63. Like the federal courts, the state courts interpreting rules substantially equivalent to Federal Rule 63 apparently have handed down no decisions that specifically allow midtrial substitution before return of a verdict.¹³⁵ Many courts, however, have specifically denied such substitution in the context of a bench trial.¹³⁶

Many state courts emphasize the fact that when credibility is at issue the interest in a trial de novo is particularly strong.¹³⁷ One court has gone so far as to hold that

130. A detailed analysis of each individual state's practice would exceed the scope of this Note. Nevertheless, it is possible to discern certain trends in state practice, the highlights of which are informative.

131. ALA. R. CIV. P. 63; ALASKA R. CIV. P. 63(C); ARIZ. R. CIV. P. 63; ARK. R. CIV. P. 63; COLO. R. CIV. P. 63; DEL. SUPER. CT. CIV. R. 63; HAWAII R. CIV. P. 63; IDAHO R. CIV. P. 63; IND. R. TRIAL P. 63(A); IOWA R. CIV. P. 367; KAN. STAT. ANN. § 60-263 (1976); KY. R. CIV. P. 63; ME. R. CIV. P. 63; MD. R.P. 528; MASS. R. CIV. P. 63; MICH. GEN. CT. R. 531; MINN. R. CIV. P. 63.01; MO. R. CIV. P. 79.01; NEV. R. CIV. P. 63; N.M.R. CIV. P. 63; N.C.R. CIV. P. 63; N.D.R. CIV. P. 63; OR. REV. STAT. § 1.120 (1981); R.I. SUPER. CT. R. CIV. P. 63; S.D. CODIFIED LAWS ANN. § 15-6-63 (1967); UTAH R. CIV. P. 63(a); VT. R. CIV. P. 63; WASH. CIV. R. 63(b); W. VA. R. CIV. P. 63; WYO. R. CIV. P. 63. Many of these states' rules differ from Federal Rule 63 only in that they specify resignation or removal from office (e.g., Arkansas, Maine, and Massachusetts), or absence from the state (e.g., Hawaii) as triggering applicability of the rule. See *supra* note 2.

132. P.R.R. CIV. P. 64.

133. Those states are: Georgia, Illinois, Louisiana, Montana, Nebraska, New Hampshire, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin. But see TENN. R. APP. P. 24(f) (giving successor judges authority to dispose of "timely filed motion[s]"); TENN. CODE ANN. § 17-1-305 (1980) (mandating new trial if death or insanity of trial judge leaves timely motion for new trial undisposed of); VA. CODE § 17-27 (1982) (giving successor judges limited powers to enter orders and decrees); WIS. STAT. ANN. § 757.08 (1981) (pending matters unaffected by vacancy in judge's office).

134. Those states are: California, Connecticut, Florida, Mississippi, New Jersey, New York, Ohio, and Texas. California's statute is very broad: "No proceeding in any court of justice . . . shall be affected by a vacancy in the office of all or any of the judges or justices thereof." CAL. CIV. PROC. CODE § 184 (West 1982). Nevertheless, some California courts have, without reference to the statute, used a practice akin to that of Federal Rule 63. See, e.g., *Fox v. Fox*, 127 Cal. App. 2d 253, 254, 273 P.2d 585, 586 (1954). Cf. *David v. Goodman*, 114 Cal. App. 2d 571, 575, 250 P.2d 704, 706-07 (1952) (party is entitled to decision by the trier of fact that heard the evidence). The Connecticut and Florida statutes are similar in breadth to the California provision. See CONN. GEN. STAT. ANN. § 51-183f (West Supp. 1983-1984); FLA. STAT. ANN. § 38.12 (West 1974). Miss. R. CIV. P. 63 allows, upon disability of the presiding trial judge, discretionary substitution at any time after commencement of the proceedings.

135. But see OHIO R. CIV. P. 63(A), which specifically allows midtrial substitution in jury trials only, *infra* text accompanying notes 147-52.

136. See, e.g., *Sunshine v. Sunshine*, 30 Colo. App. 67, 488 P.2d 1131 (1971); *Bradford v. Foundation & Marine Constr. Co.*, 182 So. 2d 447 (Fla. Dist. Ct. App. 1966); *In re Pioneer Mill Co.*, 53 Hawaii 496, 497 P.2d 549 (1972); *Christopher v. Nelson*, 50 Mich. App. 710, 213 N.W.2d 867 (1973); *Girard Trust Bank v. Easton*, 12 N.C. App. 153, 182 S.E.2d 645, *cert. denied*, 279 N.C. 393, 183 S.E.2d 245 (1971); *Welsh v. Brown-Graves Lumber Co.*, 58 Ohio App. 2d 49, 389 N.E.2d 514 (1978); *Carlsson v. Pennsylvania Gen. Ins. Co.*, 417 Pa. 356, 207 A.2d 759 (1965). See also Annot., 22 A.L.R.3d 922 (1968 & Supp. 1983).

137. *Sunshine v. Sunshine*, 30 Colo. App. 67, 488 P.2d 1131 (1971); *Bradford v. Foundation & Marine Constr. Co.*, 182 So. 2d 447 (Fla. Dist. Ct. App. 1966); *Anderson v. Dewey*, 82 Idaho 173, 350 P.2d 734 (1960); *Urbanational Developers, Inc. v. Shamrock Eng'g, Inc.*, 175 Ind. App. 416, 372 N.E.2d 742 (1978); *Moore v. Travelers Indem. Co.*,

when witness credibility is at issue in a bench trial the parties cannot even stipulate that a successor judge determine the case on the record of the prior proceedings.¹³⁸ Alternatively, another court has held that under its state's version of Rule 63, a version similar in all significant respects to the federal rule, a successor judge has authority to pass upon a motion for new trial on the grounds that the jury's verdict was against the weight of the evidence "where the record clearly discloses that no question of the credibility of the witnesses or the weight to be given to their testimony will require resolution by him."¹³⁹ Some courts have reasoned that when midtrial substitution is allowed, no deference should be afforded to the substitute judge's rulings.¹⁴⁰ This approach is undoubtedly based upon the supposition that deference is warranted only when the trial judge was present during the trial and actually saw the witnesses testify.

Some states have statutes that appear facially to allow more liberal substitution than does Federal Rule 63. Connecticut, for example, originally allowed judicial substitution only after rendering of a final judgment.¹⁴¹ The relevant statutes were amended and combined, however, in 1967, and now provide that upon disability of a judge the successor judge "shall have power to proceed . . . as if the subject matter had been originally brought before him."¹⁴² Such a conferral of "power" undoubtedly leaves the successor judge with discretion to decline to continue, should justice so require, and makes no distinction between jury and bench trials.

352 So.2d 270, 272 (La. Ct. App. 1977); *Starke v. Village of Pewaukee*, 85 Wis. 2d 272, 270 N.W.2d 219 (1978). Cf. FED. R. CIV. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."). But see *State v. McInnis*, 360 So.2d 887, 888-90 (La. Ct. App. 1978) (questioning, on the basis of *Gradney v. Vancouver Plywood Co.*, 299 So.2d 347 (La. 1974), the rule that in Louisiana an appellate court can assign less weight than usual to the findings of a substitute trial judge who did not hear the witnesses testify); *Christopher v. Nelson*, 50 Mich. App. 710, 712-13, 213 N.W.2d 867, 868 (1973) (successor judge's findings entitled to deference).

138. *Welsh v. Brown-Graves Lumber Co.*, 58 Ohio App. 2d 49, 389 N.E.2d 514 (1978). See also *Moore Golf, Inc. v. Lakeover Golf & Country Club, Inc.*, 49 A.D.2d 583, 370 N.Y.S.2d 156 (1975). In *Moore Golf*, tried without a jury, the first judge died before rendering a decision; the successor judge, upon stipulation of the parties, decided the case "on the basis of the transcript, exhibits, briefs and other filed documents." *Id.* at 583, 370 N.Y.S.2d at 157. The appellate court reversed and remanded, noting:

The resolution of this case hinges in large measure on the credibility of trial witnesses—especially that of the golf course architect. Under these circumstances, we are of the view that, in the interests of justice, a new trial is warranted in order that the testimony may be considered by a Trial Justice who hears and sees the witnesses.

Id. at 583-84, 370 N.Y.S.2d at 158. It is not clear, though, whether this result was dictated by generalized concerns, which would have formed the basis of a general rule, or by the specifics of the case—the successor judge's decision showed that he had "discounted . . . part of the architect's trial testimony." *Id.* at 583, 370 N.Y.S.2d at 158.

139. *Ruggieri v. Beauregard*, 110 R.I. 197, 200, 291 A.2d 413, 415 (1972). Presumably, the court would require a new trial, were substitution necessitated prior to return of a verdict.

140. *Moore v. Travelers Indem. Co.*, 352 So. 2d 270 (La. Ct. App. 1977); *Smith v. West Calcasieu-Cameron Hosp.*, 251 So. 2d 810 (La. Ct. App. 1971); *Steckler v. Miller & Holmes, Inc.*, 303 N.W.2d 560 (N.D. 1981). But with respect to the Louisiana cases, see *Gradney v. Vancouver Plywood Co.*, 299 So. 2d 347 (La. 1974), which, according to the court in *State v. McInnis*, 360 So. 2d 887, 888-89 (La. Ct. App. 1978), casts doubt on the current validity of *Smith* and *Moore*.

Consider also the dissenting opinion of Justice Musmanno in *Hartigan v. Clark*, 389 Pa. 283, 289, 133 A.2d 181, 185 (1957), in which he argues that decisions of a judge who did not preside at the trial should not be entitled to deferential treatment on review. In *Hartigan* "the new trial was ordered, not by the Judge who presided over the trial, but by two Judges . . . who never saw the witnesses, did not hear a word of the testimony, and are no closer to the case than we are." *Id.* at 293, 133 A.2d at 185-86. In Justice Musmanno's estimation, such circumstances eliminated the rationale behind deferential treatment of trial judge's rulings in the first place. *Accord Kostbade v. Metier*, 150 Mont. 139, 141, 432 P.2d 382, 384 (1967).

141. See *Kasarauskas v. McLaughlin*, 25 Conn. Supp. 60, 196 A.2d 118 (Super. Ct. 1963).

142. See CONN. GEN. STAT. ANN. § 51-183f (West Supp. 1983-1984).

Similarly, New Jersey allows substitution during trial, provided the judge can "familiarize himself with the proceedings and all of the testimony therein through a complete transcript thereof."¹⁴³ If the successor judge is unable to do so, the judge "shall make such disposition as the circumstances warrant."¹⁴⁴ This includes recall of witnesses or a trial de novo.¹⁴⁵ Likewise, Mississippi allows discretionary substitution upon the judge's disability at any time during the trial.¹⁴⁶

Ohio specifically allows midtrial substitution of judges in jury trials if the successor judge "certif[ies] in the record that he has familiarized himself with the record of the trial."¹⁴⁷ If the successor judge "cannot adequately familiarize himself with the record," he has discretionary authority to grant a new trial.¹⁴⁸ The rule goes on to provide that if after trial¹⁴⁹ a judge becomes disabled, the successor judge may continue the trial, or, if in his discretion he is unable to perform any required duties, he may grant a new trial.¹⁵⁰ This provision has been interpreted to require a new trial when a trial judge in a bench trial resigned prior to filing findings of fact and conclusions of law.¹⁵¹ Ohio thus appears to be the only jurisdiction to have adopted a substitution scheme such as that suggested by Judge Butzner's dissent in the *Whalen* en banc decision.¹⁵²

Another example of a provision more expansive than Federal Rule 63 is the Texas statute that empowers a successor judge, upon the death, and presumably upon other incapacity, of the trial judge prior to filing of a statement of facts or findings of fact and conclusions of law, to carry out that act.¹⁵³ A Texas court considered the view that "it would be impossible for a judge who had not heard the testimony to express in findings of fact and conclusions of law the impression which conflicting evidence had made upon the mind of one who heard it" to be "sound and the result of logical reasoning."¹⁵⁴ Nevertheless, the court stated that "the Texas Supreme Court and the Texas Legislature in a number of actions have apparently determined that the logic of [that view] should be sacrificed to the need for a more efficient judicial process."¹⁵⁵ The court went on to deny a constitutional claim that due process requires that findings of fact and conclusions of law be written by the judge who

143. N.J.R. Cr. 1:12-3(b).

144. *Id.* 1:12-3(c).

145. The power to recall witnesses is conferred only for nonjury trials. *Id.*

146. *See supra* note 134.

147. OHIO R. Civ. P. 63(A).

148. *Id.* *See also* staff notes to 1973 and 1972 amendments.

149. *I.e.*, "after a verdict is returned or findings of fact and conclusions of law are filed." OHIO R. Civ. P. 63(B). It would appear that the language referring to return of verdict is redundant in light of Ohio Rule 63(A). This is probably a simple oversight; the prior rule mirrored Federal Rule 63, and its language was apparently simply transplanted into 63(B) when the rule was bifurcated by amendment in 1972.

150. OHIO R. Civ. P. 63(B). The latter provision was added by amendment in 1973.

151. *Welsh v. Brown-Graves Lumber Co.*, 58 Ohio App. 2d 49, 50-51, 389 N.E.2d 514, 516 (1978). *See also* OHIO R. Civ. P. 63(A) staff note to 1972 amendment ("It would be inappropriate, during the testimony stage of the non-jury trial, to replace a disabled judge with a judge who had not had the opportunity to hear all testimony.").

152. *See* 684 F.2d 272, 280-82 (4th Cir. 1982) (en banc).

153. TEX. REV. CIV. STAT. ANN. art. 2248 (Vernon 1971).

154. *Lykes Bros. S.S. Co. v. Benben*, 601 S.W.2d 418, 421 (Tex. Civ. App. 1980).

155. *Id.* *Accord* *Fortenberry v. Fortenberry*, 545 S.W.2d 40 (Tex. Civ. App. 1976); *Stronck v. Stronck*, 538 S.W.2d 854 (Tex. Civ. App. 1976); *Horizon Properties Corp. v. Martinez*, 513 S.W.2d 264 (Tex. Civ. App. 1974).

presided at trial.¹⁵⁶ The Texas rule thus extends the successor judge's powers earlier into the trial process than does Federal Rule 63. But since the Texas statute seems to apply only after the conclusion of trial, it is still less liberal than Ohio's rule.¹⁵⁷

The only example of a statute stricter than Federal Rule 63 is New York Civil Practice Rule 9002, which limits the powers of a successor judge to ministerial acts such as signing the order or judgment based on the prior judge's decision.¹⁵⁸ From the language of the rule it would appear that in New York a successor judge cannot rule upon a motion for new trial or for judgment notwithstanding the verdict. In all likelihood such motions could be raised only on appeal, although it is not clear what standard of review would apply.

In sum, it is difficult to estimate the significance of state practice with respect to substitution upon death or disability of the presiding judge at trial. Since the issue is not frequently litigated,¹⁵⁹ many states that adopted facsimiles of Federal Rule 63 probably did so unthinkingly, as part of an overall adoption of the Federal Rules. Yet, of the states that have rules differing from Federal Rule 63 in a substantial way, only New York is less disposed than the federal system to allow substitution. This may be an indication that a state which considers the topic in the future will be more likely than not to opt for relaxed standards in granting discretionary substitution, particularly in the jury trial context. As will be argued below,¹⁶⁰ the approach adopted by Ohio most closely approximates the best manner in which to deal with the problems posed by death or disability of trial judges.

III. THE CASE FOR MODIFICATION OF RULE 63

As this Note has already indicated, no court before *Whalen* had decided the issue of midtrial substitution of judges in the circumstances of a preverdict jury trial.¹⁶¹ It is conceivable that this dearth of cases exists because no creative litigators prior to those in *Whalen* thought to advance the argument that substitution should be allowed in such situations despite the apparently prohibitory language of Rule 63. Or, as is perhaps more likely, the paucity of cases on point "indicates either that such substitution rarely occurs or that when it does, it does so with the consent of the parties."¹⁶² It is also possible that successor judges simply have routinely granted new trials whenever a party has objected to substitution.¹⁶³ From a legal perspective, at least, it

156. *Lykes Bros. S.S. Co. v. Benben*, 601 S.W.2d 418, 421-22 (Tex. Civ. App. 1980).

157. See *supra* text accompanying notes 147-52.

158. N.Y. CIV. PRAC. R. 9002 (McKinney 1981). The scope of the rule was expanded slightly by *Rosenshein v. Guillen*, 92 Misc. 2d 217, 400 N.Y.S.2d 33 (Sup. Ct. 1977), which held that a judgment could be signed despite the absence of findings of fact and conclusions of law when they have been waived by the parties. Nevertheless, the implication is clear that the successor judge is limited to merely "ministerial" functions.

159. See, e.g., ARK. R. CIV. P. 63 reporter's note ("Because of its limited applicability, FRCP 63 has caused little or no controversy since its adoption and it has never been amended. Accordingly, it is not believed that Rule 63 will have any significant impact upon Arkansas practice and procedure.").

160. See *infra* text accompanying notes 166-214.

161. See *supra* text accompanying note 51-52.

162. *Dickman v. Schoenfield (In re Schoenfield)*, 608 F.2d 930, 933 (2d Cir. 1979).

163. For a case in which a successor judge's decision to grant a new trial was upheld, see *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982), discussed *supra* note 122.

hardly seems surprising that the en banc majority in *Whalen* held Rule 63 to contain a clear proscription against preverdict substitution in jury trials.¹⁶⁴ Despite the arguable ambiguity of the language of the statute, nonjury cases decided under the Rule have uniformly held that midtrial substitution is prohibited by Rule 63,¹⁶⁵ and by its very language, the Rule would appear to apply identically in the jury and nonjury contexts. One might then simply dismiss the panel decision in *Whalen* as a "maverick" decision. But, even assuming *arguendo* the validity of a restrictive interpretation¹⁶⁶ of Rule 63 in its current form, the Rule should, for policy reasons, be amended to allow discretionary substitution prior to return of a verdict in jury trials.

A. *The Need for Change*

It is increasingly possible that a trial will be interrupted by the death or disability of the trial judge. As one judge has written, "With the proliferation of the federal trial judiciary and the increased tensions under which all judges live, there is great risk that our dilemma [substitution of a judge prior to verdict] will recur."¹⁶⁷ When Federal Rule of Criminal Procedure 25¹⁶⁸ was amended in 1966 explicitly to allow preverdict substitution, the Advisory Committee noted: "The problem [of judges becoming disabled during trial] has become serious because of the increase in the number of long criminal trials."¹⁶⁹ Of course, the increasing length of trials has not been limited to the criminal setting. Statistics show clearly that the median length of civil trials in the United States district courts has increased significantly since the original drafting of Rule 63. Since 1940¹⁷⁰ the median interval between commencement and disposition in these cases has doubled, from seven¹⁷¹ to fourteen¹⁷² months. Fifty-seven percent of that increase has occurred in the past ten years.¹⁷³

Moreover, in 1981 ten percent of all civil cases resolved in the district courts lasted longer than thirty-nine months.¹⁷⁴ Such statistics indicate a substantial

164. 684 F.2d 272, 273-79 (4th Cir. 1982) (en banc).

165. See, e.g., *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977); *Bromberg v. Moul*, 275 F.2d 574 (2d Cir. 1960); *Brennan v. Grisso*, 198 F.2d 532 (D.C. Cir. 1952); *Burrill v. Shaughnessy*, 9 Fed. R. Serv. 918 (N.D.N.Y. 1946); *Ten-O-Win Amusement Co. v. Casino Theatre*, 2 F.R.D. 242 (N.D. Cal. 1942). See also *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272, 274 & n.5 (4th Cir. 1982) (en banc).

166. That is, an interpretation that construes Rule 63 to prohibit at all times substitution of judges prior to filing of findings of fact or conclusions of law or return of verdict, regardless of whether the trial is to the jury or to the court. Given the foregoing analysis of the case law (see *supra* text accompanying notes 81-129), this is the approach most likely to be taken by a court today.

167. *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272, 279 (4th Cir. 1982) (en banc) (Winter, C.J., concurring specially).

168. FED. R. CRIM. P. 25 is the criminal counterpart to FED. R. CIV. P. 63. It allows substitution during trial if the judge "certifies" that he has familiarized himself with the record of the trial." FED. R. CRIM. P. 25(a).

169. FED. R. CRIM. P. 25 advisory committee note (1966).

170. Fiscal year 1940 is the first year for which comprehensive judicial statistics were kept by the Administrative Office of the United States Courts. See 1940 REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES.

171. *Id.* at 84, Table 9.

172. See 1981 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C-10, at 408 [hereinafter cited as 1981 ANNUAL REPORT].

173. In both 1971 and 1972 the median interval was 11 months. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS for the relevant year, at Table C-10.

174. See 1981 ANNUAL REPORT, *supra* note 172, Table C-10, at 408. This figure, surprisingly, remains substantially unchanged from 1940; in that year the lengthiest 10% of the cases lasted over 36 months. 1940 REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 84, Table 9.

possibility not only of death or disability of the trial judge prior to disposition, but also of increased cost and added time as a result of retrial. Of course, as the cost of litigating cases rises, parties may be more likely to consent to substitution in order to avoid the costs of retrial. But it is equally possible that parties will use refusal of consent as a bargaining tool to force a more favorable settlement, particularly if the opposing party is less able to afford large trial costs than the party refusing consent. In those circumstances the requirement of a trial *de novo* without regard to the facts and circumstances of any given case is justifiable only if it is certain to enhance the likelihood of a just or correct result in a majority of cases.¹⁷⁵ In many cases, however, such a requirement actually would impede the administration of justice, as a hypothetical case will demonstrate.

Suppose that *A*, a large corporation, is sued by *B*, a small corporation, in federal district court over a contract dispute.¹⁷⁶ *B* alleges that several machines supplied by *A* failed to meet various technical specifications, resulting in a very large amount of general and special damages. The case is tried before a jury after one year of discovery and depositions. The only issues in the case are the conformity of *A*'s machines to the specifications in the contract and the foreseeability of the alleged special damages. Testimony on these issues comes from expert witnesses and employees called by each side, all of whom have unimpeached credibility. After the close of evidence by both sides, but before the jury is charged, the judge dies; at this point, the case has been at trial for two weeks. *A* demands a new trial, hoping to convince *B* that even agreement to a settlement favorable to *A* would be preferable to the costs of retrial.

Assume further that, within the language of Rule 63, the successor judge assigned to the case is satisfied that he understands the case and that, having read the trial transcripts, he is able to perform fairly all required duties. What then, if anything, will be gained by retrial? If there is no retrial, the successor judge must rule on any motions for a directed verdict.¹⁷⁷ If any such motions are denied, he will then charge the jury, and after verdict, rule on motions for judgment notwithstanding the verdict¹⁷⁸ or for a new trial.¹⁷⁹ If the successor judge rules on these matters, will he do so lacking any information that the original trial judge would have had?

At the outset, it is important to note the fundamental distinction between a motion for directed verdict or judgment notwithstanding the verdict, and a motion for a new trial. Under the Federal Rules of Civil Procedure if a motion for a directed verdict made after close of evidence "is denied or for any reason is not granted," such denial is treated as if the judge has reserved determination until after return of verdict.¹⁸⁰ A successor judge who enters the case after return of verdict should be very reluctant to grant a motion for judgment notwithstanding the verdict absent clear

175. A rule that requires new trials in situations in which they may not be necessary could hardly be justified on the grounds of saving time and money for litigants.

176. We may assume that, for the purposes of this hypothetical, subject-matter jurisdiction exists. There is a skeletal resemblance between *Whalen* and this hypothetical.

177. FED. R. CIV. P. 50(a).

178. FED. R. CIV. P. 50(b).

179. FED. R. CIV. P. 59(a).

180. FED. R. CIV. P. 50(b).

and incontrovertible evidence of mistake by the jury; in other words, he or she deals only with "the question of law whether there is sufficient evidence to raise a jury issue."¹⁸¹ Thus, with respect to granting or denying a motion for directed verdict or judgment notwithstanding the verdict, the fact that the successor judge did not see the witnesses poses no problem; all issues of credibility are resolved in favor of the party against whom the motion is made.¹⁸² In contrast, when weighing a motion for a new trial, a successor judge would be required to weigh the credibility of witnesses who may have testified before the successor judge entered the case.¹⁸³

Even given this distinction, two theories support an affirmative answer to the above question. One is based on the fact that the successor judge was not present to see the witnesses testify, with the result that the trial judge "was better qualified . . . to determine the credibility and weight of the evidence."¹⁸⁴ Presumably, this supposition rests on the notion that "transcripts of testimonial evidence—which cannot capture the sweaty brow, the shifty eye, the quavering voice—never fully reflect what was communicated by the testifying witnesses."¹⁸⁵ But in the hypothetical case, because all witnesses are experts testifying on technical matters, their credibility is not at issue. Thus, this theory does not support a requirement of a trial *de novo* in those circumstances.¹⁸⁶

The second theory is represented by the idea that "an inescapably hasty treatment" of a case can never equal "a careful, measured approach" to the legal issues of a case, over a period of months or years.¹⁸⁷ With respect to the hypothetical case the weakness of this argument is that it simply may not be true. Indeed, it may very well be that a judge who has recently sifted through all the documents and transcripts relevant to a case is in a more knowledgeable position than his or her counterpart who may rely only on remembrance of past arguments and motions. Moreover, Rule 63 incorporates a procedural safeguard: if the successor judge feels unable to take over

181. 9 C. WRIGHT & A. MILLER, *supra* note 3, § 2531, at 575.

182. *Id.* This means that under the accepted interpretation of Rule 63, a successor is empowered to decide a motion for judgment notwithstanding the verdict after findings have been filed, but not a motion for directed verdict before the findings are filed, although the two types of motions raise identical issues. This can be seen as an anomalous result, *see* Case Comment, *supra* note 58, at 841, but arguably could be justified by practical concerns. *See infra* text accompanying note 187.

183. 9 C. WRIGHT & A. MILLER, *supra* note 3, § 2531, at 575.

184. *Brennan v. Grisso*, 198 F.2d 532, 533 (D.C. Cir. 1952).

185. *Dickman v. Schoenfield (In re Schoenfield)*, 608 F.2d 930, 935 (2d Cir. 1979). *See also* *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (trier of fact "sees the witnesses and hears them testify, while . . . the reviewing court look[s] only at cold records"; hence the determinations of the trier of fact are entitled to deferential treatment); *Freeman v. United States*, 227 F. 732, 759 (2d Cir. 1915) ("demeanor of a witness on the stand may be as important as any other evidence in the case"). *But see* *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1084-85 (9th Cir. 1977) (Duniway, J., concurring in part and dissenting in part) ("I am convinced . . . that much that is thought and said about the trier of fact as a lie detector is myth or folklore." Whereas one fact finder might find a witness highly credible, "another fact finder seeing and hearing the same witness may conclude that he is just too good a testifier, that he is an expert actor, and that he is also a liar.").

186. For an example of similar reasoning, *see* *Bangor & Aroostook R.R. v. Brotherhood of Locomotive Firemen & Enginemen*, 314 F. Supp. 352, 355-56 (D.D.C. 1970) (important consideration in allowing substitution was fact that "[t]here were no witnesses, no testimony to be subjected to a credibility test"), *aff'd in part and rev'd in part on other grounds*, 442 F.2d 812 (D.C. Cir. 1971). *See also* *St. Louis S.W. Ry. v. Henwood*, 157 F.2d 33 (8th Cir. 1946); *infra* text accompanying notes 199-205.

187. *Whalen v. Ford Motor Credit Co.*, 32 Fed. R. Serv. 2d 678, 692 (4th Cir. 1981) (Murnaghan, J., dissenting). Judge Murnaghan argued that a trial before a substitute judge will inherently fail to provide that judge with "the same scope for understanding." *Id.* at 693.

the preceding judge's duties, a new trial should be ordered. It is not unreasonable to presume that a judge would do so if unable, in a short period of time, to assimilate an extensive record.

The hypothetical assumed both that the successor judge felt capable of fairly and knowledgeably ruling on the issues of the case and that he or she made this judgment in good faith. While there thus appears to be little reason for requiring a new trial in this situation, Rule 63, as interpreted by the existing case law, would indeed require a new trial.¹⁸⁸

The best arguments in support of this restrictive rule are those already mentioned. As advanced by Judge Murnaghan, they are to the effect that midtrial substitution is inherently unfair to the parties.¹⁸⁹ As he states the view, "[I]t is . . . difficult to conclude, as the majority has done, that '[the successor judge's decision to continue the case] prejudiced no one.'"¹⁹⁰ The judge goes on to explain, "[H]e [the successor judge] was denied . . . the long period of time for easy step-by-step familiarization with the case . . . and the gradual piecing of its multiple facets and aspects together, so that he could see it from a proper long range perspective, rather than from a compressed, necessarily almost unidimensional viewpoint . . ."¹⁹¹ He concludes, "Simply and summarily put, a trial tried partly before one judge, partly before another, just cannot afford the same scope for understanding to the second judge which one judge hearing the entire trial would have."¹⁹²

Yet, one might agree with Judge Murnaghan's argument and still support liberalization of the Federal Rule 63 strictures. Due process has been held not to require a perfect trial, but only a fair one.¹⁹³ Requiring retrial may be just as unfair to one party as allowing substitution would be to another. And unfairness in the former context is certain, in terms of time, money, and the rigors of attending trial. The costs to the judicial system are also certain, in terms of the time and manpower costs of retrial. Some of these costs were described by a federal district court in the following way:

Many factors must be weighed in the decision to proceed. The parties' time and expense and the resources of [the predecessor judge's] court should be preserved if possible. A jury has faithfully listened to evidence over the past three weeks. Their efforts should not be lost. The legal issues, although allegedly unsettled, should not be unique to [the successor judge]. . . . We also note that it has been several years since the acts that

188. The en banc majority in *Whalen* relied strictly upon an interpretation of Rule 63 that was independent of the facts of the case; it even deemed the absence of any prejudice resulting from substitution to be irrelevant. 684 F.2d 272, 274-79 & n.14 (4th Cir. 1982) (en banc).

189. See 32 Fed. R. Serv. 2d 678, 685 n.2, 693 (4th Cir. 1981) (Murnaghan, J., dissenting).

190. *Id.* at 685 n.2.

191. *Id.*

192. *Id.* at 693.

193. See *Brown v. United States*, 411 U.S. 223, 231-32 (1972) ("'[A] defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials") (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968), quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)). If a defendant is not entitled to a perfect trial in the criminal setting, it follows a fortiori that parties are not entitled to one in a civil action. Cf. *Lykes Bros. S.S. Co. v. Benben*, 601 S.W.2d 418, 421-22 (Tex. Civ. App. 1980), in which the court denied a claim "that constitutional due process requires the trial judge who heard the evidence and rendered judgment to make the findings of fact and conclusions of law" for lack of any authority on point. Thus, restrictions on judicial substitution were held to arise from statutory, and not constitutional grounds. *Id.* (citing *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977)).

plaintiff challenges took place. It may be an extended period of time before the case could be retried. We are also aware, as Judge Phillips noted in *Arrow-Hart, Inc.*, that a "staggering" number of cases are being filed in this District at this time.¹⁹⁴

Such clear and certain costs, when weighed against what are in many cases the speculative consequences of decreased judicial "understanding" or "familiarity" with a case, strongly recommend allowance of discretionary midtrial substitution of judges in jury trials.

B. *A Proposed Approach*

Of necessity, such discretion would be subject to certain restrictions. Under a discretionary rule such as the one here proposed, a successor judge should weigh four considerations in deciding whether to continue or to grant a new trial.

1. *The Point to Which the Trial Has Proceeded*

When a judge's disability occurs very early or very late in a trial, midtrial substitution will normally be more appropriate than it would be in the middle of a trial. Early on, because the judge probably will not have missed very much, assuming he has not missed a key witness, the chances of prejudice are small. Late in the trial, for instance, after close of evidence, the judge will have a fully developed record before him.¹⁹⁵ More important, he will not have seen the presentation of either party's evidence. It would seem inherently unjust for a judge to be present for one party's evidence and not the other's because it is difficult to imagine that the evidence that the judge saw presented would not be more vivid in his mind than that of which he merely read a transcript.

2. *The Complexity of the Trial*

The more complex the issues or history of a trial, the more unlikely it is that a successor judge could validly deny a motion for a new trial. A judge should be cautious in this regard; it would be counterproductive to decide a case on presumptions about the facts or issues that eventually prove erroneous.¹⁹⁶

This consideration incorporates into the successor judge's analysis Judge Mur-naghan's concern that a successor judge will possess less understanding of a case than did the predecessor.¹⁹⁷ While the mere possibility of a less knowledgeable judge should not by itself mandate a new trial,¹⁹⁸ as the complexity and likelihood of misunderstanding increase, so does the interest in a new trial.

194. *Morton v. Ortho Pharmaceutical Corp.*, 550 F. Supp. 416, 418 (E.D. Tenn. 1982).

195. This must be balanced, of course, against the competing consideration that the further a trial proceeds, the longer the record becomes. Thus, as the trial progresses the likelihood that the successor judge would be unable to assimilate fully the necessary information increases.

196. This view may be founded on purely practical grounds; a judge who is unsure of the facts or issues of a case is more likely to render a decision that is reversed on appeal.

197. See *supra* text accompanying notes 189-92.

198. See *supra* note 193 and accompanying text.

3. The Importance of Credibility as an Issue

A number of federal courts have recognized that in a nonjury trial an appellate judge is in a position as good as the trier of fact to make findings on the basis of nondemeanor testimony.¹⁹⁹ Thus, with respect to such testimony, findings by the trier of fact "are not binding on the appellate court and will be given slight weight on appeal."²⁰⁰ Similarly, when the credibility of witnesses has been contested at trial, the appropriateness of a grant of a new trial increases with the rise in importance of credibility issues. In many cases the fact that the successor judge was not present for testimony may be dispositive.²⁰¹ But the mere fact that credibility is an issue should not alone render a successor judge powerless to continue a trial over objection, particularly since the jury is the finder of fact and remains the same despite substitution of judges. Thus, the court is not presented with a case in which a finder of fact must render a decision without having seen and heard the witnesses testify.

Moreover, the successor judge's inability to evaluate the demeanor of the witnesses might simply be unimportant in the context of the trial as a whole.²⁰² The Eighth Circuit recognized this policy concern when allowing midtrial substitution in *St. Louis Southwestern Railway v. Henwood*.²⁰³ The trial judge had died after close of evidence, but before respective counsel had completed their closing arguments. The circuit court noted that the successor judge had before him transcripts of all prior testimony and that "all that [the successor judge] lacked was the opportunity to estimate the credibility of [the] witnesses from their appearance and demeanor on the stand."²⁰⁴ In the court's view, however, this lack was inconsequential, as the only issue of credibility related to alleged inconsistencies between written statements of the witnesses and their subsequent oral testimony. The court believed that with respect to such issues, the alleged inconsistencies "speak from their face and little aid in judging credibility is gained by viewing the witness."²⁰⁵ Since *Henwood* was a trial to the bench, the same reasoning would apply a fortiori to a jury trial in which the fact finder will have had the opportunity to assess the demeanor of the witnesses.

A countervailing concern is that a federal judge is empowered, under Supreme Court Standard 107,²⁰⁶ to comment to the jury on the credibility of witnesses. This

199. 5A MOORE's, *supra* note 2, ¶ 52.04, at 2677 & n.2. *But see* FED. R. CIV. P. 52(a) advisory committee note (1937) ("[Rule 52(a)] is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflicting testimony, or of a fact deduced or inferred from uncontradicted testimony").

200. 5A MOORE's, *supra* note 2, ¶ 52.04, at 2677.

201. For example, cases in which the outcome depends upon the jury's acceptance as credible of one of two witnesses' conflicting testimony. *See, e.g.,* Dickman v. Schoenfield (*In re Schoenfield*), 608 F.2d 930, 936-37 (2d Cir. 1979) (court in bankruptcy proceeding requires new trial, at least partly due to the importance of the bankrupt's testimony); *In re Ostrer*, 393 F.2d 646, 648-49 n.1 (2d Cir. 1968) ("On an issue like intent to deceive, where the bankrupt's credibility is an important factor, the referee's findings should be accorded great weight since he had an opportunity to hear and observe the bankrupt"). For similar state cases, *see supra* note 137.

202. For example, the credibility of a witness whose testimony was independently corroborated by numerous other unimpeached witnesses could not be considered critical to the outcome of the case.

203. 157 F.2d 337 (8th Cir. 1946).

204. *Id.* at 342.

205. *Id.*

206. Supreme Court Standard 107, "Summing Up and Comment by Judge," states:

After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also

should not, however, be perceived as presenting any special problem in most cases. First, by its very terms Supreme Court Standard 107 is discretionary; under no circumstances is a federal judge required to comment on the evidence. Moreover, federal judges appear to comment in fewer than one out of three federal jury trials.²⁰⁷ Additionally, to the extent that the judge's comments merely aid the jury

by recalling [the witnesses'] testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, . . . by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them,²⁰⁸

a successor judge, who presumably has concluded that he or she has the requisite understanding of the facts and issues to continue, is in as good a position as the predecessor to carry out these duties.

The judge's power to comment on the specific credibility of individual witnesses, however, is more problematic. It has been stated that the judge's right to so comment "has two aspects: (1) the power of the judge to advise the jury on what factors to consider when evaluating a witness' credibility and (2) the power of the judge to express his own views as to the believability of a witness."²⁰⁹ Clearly, the first of these presents no problem for a successor judge; he or she knows what the prior testimony was and is in as good a position as the predecessor to explain relevant rules of law to the jurors.

Yet, comments by a judge on the credibility of actual testimony can, because of a jury's tendency to defer to the judge's views, be of enormous importance in a close case. This fact, coupled with the asserted advantages of allowing judicial comments on credibility in the first place,²¹⁰ militates in favor of a trial de novo when the successor judge sees a potential for the need for such comments to the jury. In other words, the interest in a new trial increases as it begins to appear that the issue of credibility may be outcome-determinative.

The view that midtrial substitution is less appropriate when credibility of witnesses who have already testified is at issue also finds significant support in case law outside the domain of the Federal Rules, including a number of modern state cases,²¹¹ modern bankruptcy decisions,²¹² and at least one federal case predating the Federal Rules.²¹³ Moreover, a bright-line rule that the presence of credibility as an

instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

207. See H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* 422 (1971) (placing the figure at 32%). See generally J. WEINSTEIN, *WEINSTEIN'S EVIDENCE* ¶ 107[01], at 107-7 to 107-11 (1982).

208. *Nudd v. Burrows*, 91 U.S. 426, 439 (1875).

209. J. WEINSTEIN, *supra* note 207, ¶ 107 [04], at 107-47 to 107-48 (1982) (footnotes omitted).

210. See *id.* ¶ 107 [01], at 107-16 ("As a matter of comparative advantages, some have concluded that the lesson of experience has been that a judge's comments tend to sharpen the issues for the jury, clear away the extraneous materials that creep into any trial and, in general, make for more accurate verdicts"). See also *id.* ¶ 107 [01], at 107-17.

211. See *supra* note 137 and accompanying text.

212. See *supra* note 201. See also *supra* text accompanying notes 203-05.

213. *Cahill v. Mayflower Bus Lines*, 77 F.2d 838, 840 (2d Cir. 1935). Cf. *Freeman v. United States*, 227 F. 732, 759-60 (2d Cir. 1915) (seventh amendment right to a jury trial requires in criminal cases, owing to the importance of judicial evaluation of witness demeanor, "[t]he continuous presence of the same judge and jury . . . throughout the whole

issue in a case determines the availability of midtrial substitution has been suggested for incorporation into Federal Rule 63.²¹⁴ Thus, the credibility test, which finds support in the cases and commentary on them, as well as in policy, is clearly a significant consideration for a successor judge.

4. *Good Faith of the Parties*

The successor judge should require a clear and concise statement from the party objecting to substitution, specifically stating that party's grounds for believing that prejudice would result from failure to grant a new trial. Such grounds should relate back to those previously discussed, such as complexity of the litigation and issues of credibility. Parties should not be permitted to use motions for new trials and refusal to consent to substitution as an added bargaining tool to force a more favorable settlement or simply to harass an opponent. Not only is this tactic unfair to the opposing party, who is put at a disadvantage by the happenstance of the death or disability of the trial judge, but also the failure to reach a settlement compels the courts to suffer through a time-consuming retrial for no legitimate reason.

IV. CONCLUSION

In sum, then, a wide variety of interests is affected by a decision whether to continue a trial after loss of the judge, and it is the opinion of this author that no bright-line rule can adequately reconcile them in all, or even most, cases. Proper balancing of the factors delineated above—how far the trial has proceeded, the length and complexity of the trial, the presence of credibility as an issue, the threat of prejudice, and good faith of the parties—allows a determination of the question of substitution that has the potential to maximize the efficiency of the judicial system while at the same time protecting the rights served by it. In any event, whatever amendment, if any, to Rule 63 is ultimately adopted, the issue is certainly one worthy of the Advisory Committee's attention.

Neil Stern

of the trial"). *Freeman* presents a special case in two respects. First, it was a criminal case decided under a constitutional principle (criminal defendant's inability to waive the right to a jury trial) that was later overruled in *Pathon v. United States*, 281 U.S. 276 (1930). Second, and more important, were the circumstances surrounding the substitution of judges: the successor judge missed the prosecution's entire case-in-chief, including the testimony of 106 witnesses. Under those circumstances, it is questionable whether even FED. R. CRIM. P. 25(a), requiring certification by the successor of his "familiariz[ation] with the record of the trial," could reasonably have allowed substitution. *Freeman's* substantive holding appears to have been overruled in *United States v. LaSorsa*, 480 F.2d 522, 531 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973).

214. Case Comment, *supra* note 58, at 839-43.

